No. 89-___

In The

Supreme Court of the United States

October Term, 1989

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 881, Chartered by
United Food and Commercial Workers
International Union, AFL-CIO, CLC,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a question concerning representation arises under the National Labor Relations Act, as amended, when an independent union, as a result of a union merger and change of affiliation, has lost its autonomy with respect to, *inter alia*, (a) determining its own collective bargaining proposals, (b) ratifying its own agreements reached in collective bargaining, (c) determining whether to strike, and (d) determining whether to pay strike benefits to its striking union members.

2. Whether, particularly in view of the loss of autonomy described in (1) above, the National Labor Relations Board's "due process" safeguards have been met in a union merger/affiliation election when a commingling of ballots has made it impossible to determine whether the union members in each appropriate bargaining unit voted for or against the merger/affiliation change.

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Although the caption of this case refers to Petitioner as "May Department Stores Company, Venture Stores Division," that caption is no longer accurate and may be misleading. While Venture Stores was, at the time of the outset of these proceedings, an unincorporated division of May Department Stores Company, it is now a separately incorporated entity which is a wholly owned subsidiary of The May Department Stores Company, an independent publicly owned company. Venture Stores, Inc., has no subsidiaries. Should the Court also desire disclosure of the identity of other wholly owned subsidiaries and affiliates of The May Department Stores Company, we will, upon request, provide a supplemental list.

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STATUTES

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (A. 1a)[1] enforces the Decision and Order of the National Labor Relations Board (A. 27a), which is reported at 289 NLRB No. 88 (1988). (The NLRB had also issued an unpublished decision denying a motion for reconsideration filed by May Department Stores, Venture Stores Division [A. 55a]). The Seventh Circuit also denied, without opinion, Venture Stores'[2] motion for reconsideration *en banc* [A. 25a].

There had been a previous decision by the Seventh Circuit in 1985, affirming the National Labor Relations Board's order dismissing the complaint against Venture Stores. *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7th Cir. 1985), affirming 268 NLRB 1979 (1984). Since neither of these earlier decisions have direct relevance to the instant stage of these proceedings, we have not included them in the Appendix.

JURISDICTION

The judgment of the Court of Appeals (A. 1a) was entered on February 28, 1990. Petitioner's motion for reconsideration *en banc* was denied on April 11, 1990 (A. 25a). This Petition for Certiorari was filed within 90 days

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[1] "A. ___" refers to the page number of the Appendix hereto.

[2] May Department Stores Company, Venture Stores Division, Petitioner herein, will be referred to herein as "Venture Stores" or simply as "Venture."

of the denial of the motion for reconsideration. Jurisdiction is conferred on this court by 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1) and § 159(a), are set forth in the Appendix hereto (A. 59a).

STATEMENT OF THE CASE

Venture Stores Division, May Department Stores Company ("Venture") acquired ten retail stores in the Chicago Metropolitan Area from The Jewel Companies, Inc., in the spring of 1978. The employees in these ten stores were represented by the United Retail Workers Union ("URW"), an independent union, in one bargaining unit, as a result of The Jewel Companies, Inc., having voluntarily recognized the URW as bargaining agent for this ten store unit (J.A. 68-69).[3]

In the same acquisition from Jewel, Venture had also acquired one store in Decatur, Illinois. Earlier, the URW had been certified as the exclusive bargaining representative for the nonsupervisory employees at this Decatur

[3] "J.A. ___" refers to page numbers and to the Stipulated Joint Appendix which was provided to the Seventh Circuit Court of Appeals by the parties. It includes the stipulation of facts and joint exhibits which constituted the agreed upon record before the National Labor Relations Board, obviating the need for a hearing before an Administrative Law Judge.

location (J.A. 71). The certification and the ensuing bargaining was limited to this one store as a separate bargaining unit (J.A. 71, 73).

Venture continued to recognize and bargain with URW in each of these two separate units after the acquisition (J.A. 72-73, 93-111, 114-176).

In the summer of 1981, the URW officers endorsed a resolution of merger and affiliation between URW and the United Food and Commercial Workers International Union ("UFCW") (J.A. 75-77, 245-246). Prior to the merger the URW was an independent union with four locals and about 20,500 members. The employees in the two Venture bargaining units totaled 1,214 (J.A. 82). The UFCW was, and is, an international union affiliated with the AFL-CIO.

The merger resolution was submitted for a vote to the approximately 20,500 URW members by mail ballots (J.A. 81-82). Of the union members who received ballots, over 19,000 were employed either by Jewel Food Stores or Jewel affiliates (J.A. 79, 81-82).

There were 9,235 ballots returned (J.A. 82), indicating that 6,823 individuals (about one-third of the URW's eligible membership) had voted in favor of the merger/affiliation with the UFCW; 2,344 members had voted "No," and there were 68 invalid ballots (J.A. 82).

Only 389 individuals employed in the two Venture Stores units returned ballots (J.A. 82). Because of the commingling of ballots, it is impossible to determine whether a majority of the ballots returned by Venture

union members in either or both of the Venture bargaining units were cast for or against the merger/affiliation.

Venture, after receiving a demand for recognition from Local 881 (the Local established by the UFCW to represent employees formerly represented by the URW), filed timely petitions with the National Labor Relations Board seeking elections in each of the two bargaining units of its employees which had been represented by the URW (J.A. 86-87, 339-342). The Board dismissed those election petitions. Instead, the General Counsel of the Board issued the complaint in this action against Venture, alleging that it had violated Sections 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C., § 158[a][5] and [1]) by unlawfully refusing to recognize and bargain with Local 881 of the UFCW.

On February 17, 1984, the NLRB issued a decision, reported at 268 NLRB 979, dismissing the complaint on the ground that bargaining unit employees who were not also members of the union had not been permitted to vote in the affiliation election. On October 1, 1985, the Seventh Circuit Court of Appeals affirmed the Board order. *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7th Cir. 1985). UFCW's Local 881 petitioned this court for certiorari and, in light of this court's decision in *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986) (*"Sea-First"*), this court granted Local 881's petition for a writ of certiorari and remanded the case to the Seventh Circuit for further consideration. 475 U.S. 1138 (1986). On remand, the Seventh Circuit reversed the NLRB's decision on the issue of whether a failure to accord non-union members a right to vote on the merger and affiliation justified a

refusal to bargain, but remanded the case to the Board for further proceedings. *United Retail Workers Union, Local 881 v. NLRB*, 797 F.2d 421 (7th Cir. 1986). The Board then reconsidered the matter and issued the Decision and Order at issue here (A. 27a).

In that Decision, the Board found that its two tests (due process and continuity) for imposing a continuing bargaining obligation on an employer after a union merger or affiliation change had been met. The Seventh Circuit Court of Appeals affirmed the Board's decision and enforced its Order (A. 1a). It is from this decision that we seek certiorari, having first filed a motion for reconsideration *en banc* which was denied by the Seventh Circuit (A. 25a).

With respect to the issue as to whether the organizational changes accompanying the merger and affiliation were substantial enough to create a different entity, neither the NLRB nor the Seventh Circuit found it significant that, as a result of the merger, collective bargaining proposals are required to be submitted to the UFCW headquarters in Washington, D.C. for a determination as to whether the proposals are in conformance with the UFCW's bargaining objectives (J.A. 207, Art. 23[A]).

Nor did either the Board or the court find it significant that the UFCW International President has authority to require a collective bargaining agreement agreed upon locally to be submitted to him for approval, prior to submitting it to the employees for ratification (J.A. 184, Sec. 9; J.A. 207, Art. 23[D]2).

Also not found significant were the post-merger requirement of the International Union's prior approval

for employees in the Venture bargaining units to engage in a strike and the requirement of International approval for payment of strike benefits (J.A. 184, Sec. 10; J.A. 208, Arts. 23[E] and [F]7).

With respect to the second prong of the NLRB's inquiry – i.e., whether the merger/affiliation election was conducted with adequate due process safeguards – both the court and the NLRB ruled that it was unimportant to determine whether a majority of the union members of each of the appropriate Venture bargaining units voted for or against the merger and affiliation change. The NLRB said, "It is unnecessary to determine precisely how each unit of employees of each employer voted" (A. 42a). Venture contended, both before the Board and before the Court of Appeals, that it is essential to due process that union members in each bargaining unit be given an effective vote with respect to affiliation.[4] The Court of Appeals said such a requirement would be "inconsistent with the spirit, if not the letter, of *Sea-First*" because the Court understood this Court's decision in *Sea-First* to mean that all matters relating to balloting are "basically internal union affairs" and thus beyond the reach of the Board (A. 14a).

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[4] This is not the issue dealt with in *Sea-First* of whether *all employees* in the bargaining unit must be given the opportunity to vote on the merger/affiliation. It is whether a majority of *union members* in the relevant bargaining unit have had an effective vote on the merger/affiliation of the Union which currently claims to represent *that unit*.

The Court of Appeals attempted to distinguish the decisions of the Sixth Circuit which Respondent contended *did* require union member majority support of a merger/affiliation in each appropriate unit[5], and relied instead on a Second Circuit decision as demonstrating judicial support for not imposing such a requirement in order to satisfy the "due process" test[6] (A. 12a-14a).

REASONS FOR GRANTING THE WRIT

A. IT IS IMPORTANT THAT THIS COURT SETTLE THE QUESTION OF WHETHER A LOSS OF AN INDEPENDENT UNION'S BARGAINING AUTONOMY RESULTING FROM A UNION MERGER CHANGES THE UNION'S IDENTITY AND THUS RAISES A "QUESTION OF REPRESENTATION" UNDER THE NATIONAL LABOR RELATIONS ACT

As noted in the foregoing Statement of the Case, the merger/affiliation here substantially affected the bargaining autonomy which had been enjoyed by the URW prior to the merger/affiliation. After the merger/affiliation, (1) the UFCW Washington headquarters had to approve bargaining proposals before they could be submitted in negotiations; (2) the UFCW International President could require agreements reached at the bargaining table to be submitted to him and if he did not approve the

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[5] *NLRB v. Canton Sign Co.*, 457 F.2d 832 (6th Cir. 1972) and *William B. Tanner Company v. NLRB*, 517 F.2d 982 (6th Cir. 1975).

[6] *NLRB v. Eastern Connecticut Health Services, Inc.*, 815 F.2d 517 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 140 (1987).

agreement, the agreement could not even be submitted to the employees in the bargaining unit for ratification; (3) even if the employees in the bargaining unit voted to reject the final offer of the employer in negotiations, they could not strike without the approval of the International Union; (4) union strike funds could not be utilized to support a strike desired by the employees in the bargaining unit unless approval was granted by the International Union.

Neither the NLRB nor the Court of Appeals for the Seventh Circuit regarded these changes as significantly altering the identity of the union or as significantly affecting its "continuity" in such a way as to substantially change its relationship to the employees it has represented, thereby raising a "question concerning representation."

In discussing the NLRB's policy in this area, this Court said in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192, 202 (1986):

> Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may, in turn, raise a 'question of representation' if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election.

Further, in the same case, again discussing changes brought about by a merger or affiliation, this Court said:

> If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. *Id.* at 206.

In *Sea-First*, the issue of whether the affiliation there resulted in sufficiently substantial changes to effectuate a change in the union's identity was not before this Court for decision (*Sea-First*, n.7, at 200). Thus, the opinion in that case sheds no light on the question of whether substantial changes in a union's bargaining autonomy give rise to a "question concerning representation," when, as here, it is "unclear whether a majority of bargaining unit union members continue to support the reorganized union."

In cases such as *American Bridge Div., United States Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *NLRB v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976); and *Sun Oil Co. v. NLRB*, 576 F.2d 553, 557 (3d Cir. 1978), the Third Circuit has found that substantial dilution of local bargaining authority is a significant factor in establishing that a substantial change has taken place in the identity of the employees' bargaining representative. In *Bernard Gloekler, supra*, the court held that a question concerning representation had arisen, and referred to the loss of autonomy as evidenced by the International's power to determine whether a strike could be called and to act for the membership "when urgent business requires" as, quoting from *American Bridge, supra*, "a change in the fulcrum of union control and representation." 540 F.2d at 202.

In *American Bridge*, the court had said:

> The International will have the power to determine when a strike can be called and when a contract will be signed. . . . There is a clear departure from the former status of an independent union, where local officers negotiated the contract, settled the terms, handled the grievances and decided when and when not to strike . . . Important powers thus have been transferred to the officers of the International Union, who carry responsibility for the overall interests of the 1,120,000 members of the union and not necessarily the primary interests of the 304 salaried, clerical and technical personnel at Ambridge (referring to the location of the bargaining unit involved there.) *Id.* at 664.

The NLRB, in its decision here, lightly dismissed the changes we have referred to and found there had been "no substantial impairment or reduction of local autonomy . . . " (A. 45a). It said that autonomy:

> is not negated by the right of the International under its constitution to approve certain actions taken by the local, including approval of initial negotiated proposals drafted by the local, and collective bargaining agreements negotiated by the local prior to submission to local union membership for ratification. These reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs. (A. 45a).

The Court of Appeals for the Seventh Circuit agreed, quoting with approval much of the above quoted language from the NLRB's decision and characterizing the

record as showing "that primary control over the negotiation and implementation of collective bargaining agreements is vested in Local 881's officers and that the ultimate authority to reject or accept agreements lies with the local members" (A. 18a).

The requirements for International approval of both initial bargaining proposals and of agreements reached at the local level were brushed off by both the Board and the Court as being unimportant, as was the requirement that the UFCW president must also approve both the calling of a strike and authorization for payment of strike benefits.

We respectfully submit that the issue cannot be so lightly brushed aside. The limited right merely to initiate action, subject to approval by others, is far different from the right independently to take final action. It avails Union members in the two Venture Stores bargaining units little to vote on initial proposals, to vote to approve a contract, or to vote to strike if each and every one of those initiatives can be vetoed by the central authority of the UFCW International. Yet such are the facts of record here. The Board and the Court cannot avoid the significance of those facts by characterizing them as "unimportant." They are clearly sufficient to demonstrate that control over all aspects of negotiations by local union members and officers has been substantially diluted.

The issue which, we submit, warrants decision by this Court is whether such dimunition of local control and autonomy necessarily, in the words of this Court, does or does not "substantially change a certified union's relationship with the employees it represents."

We should also note here that the facts in this record do indeed, again in the language of this Court, make it "unclear whether a majority of employees continue to support the reorganized union." It is impossible to determine in this case whether union members in either the ten store Chicago bargaining unit or in the one store Decatur bargaining unit voted for or against a merger/affiliation. Thus, whether a majority of employees in either unit ever did "continue to support the reorganized union" is not only "unclear," – it is unknown and, on this record, unknowable.

It is even more doubtful whether the current Venture units' workforces "continue to support" the UFCW. Since 1981 the composition of the Venture units has changed substantially, as Venture offered to show if the NLRB had granted its motion to reopen the record for this purpose. This lack of clarity of employee support impacts, as this Court has said, on the continuity issue, and thus on whether there is a question concerning representation. If there is such a question present, then a bargaining order is contrary to the policies of the Act.

When there is no affirmative evidence to show employee support, as the Sixth Circuit said in *Clark's Gamble Corporation v. NLRB*, 407 F.2d 199, 202 (6th Cir. 1969):

> and where the period for personnel turnover has been extended by Board occasioned delay, we conclude that it would be contrary to the intent of the Act to order enforcement.

Here the period for personnel turnover has indeed been extended by Board occasioned delay, as its approach to merger/affiliation issues has vacillated over the last

nine years. The delay was *not* caused by Venture's unlawful conduct. Its withdrawal of recognition was found lawful at the time by both the NLRB and the Seventh Circuit in their 1984 and 1985 decisions. Even in a case where there have been flagrant employer violations, the Seventh Circuit has very recently, unlike its decision here, refused to order bargaining in a case involving long, Board occasioned delays. *Montgomery Ward & Co., Incorporated v. National Labor Relations Board*, ___ F.2d ___, Cases Nos. 88-2105 and 88-2471 (7th Cir., June 13, 1990).

We urge that the substantial reduction in bargaining autonomy did substantially change the relationship between the union and the employees it claims to represent. That fact, viewed in the light of the uncertainty as to whether the bargaining unit employees continue to support the reorganized union, gives rise, we also urge, to a question concerning representation.

The NLRB could and should have resolved that question nine years ago by granting Venture's 1981 petition for an election.

Whether, as a matter of law, such a dilution of bargaining autonomy should be found to change a union's identity and whether, when it is unclear whether a majority of employees in the appropriate unit continue to support the union claiming bargaining rights, those facts give rise to a question concerning representation, thus making a bargaining order inappropriate, all pose significant questions of federal labor law.

They become of particular significance since this Court's decision in *Sea-First* makes a determination as to whether there has been such a change – the *crucial* factor

in this type of case. As this Court knows, these merger/affiliation cases spawn controversy. The settling of this significant question by this Court can expedite the resolution of such controversies, or, at the very least, expedite the litigation process.

We respectfully submit that a Writ of Certiorari should be granted because the decision of the Seventh Circuit in this case involves an important question of federal law which has not been, but should be, settled by this Court.

B. THERE IS A CONFLICT IN THE DECISIONS OF THE CIRCUITS AS TO WHETHER UNION MEMBERS IN EACH BARGAINING UNIT MUST BE ACCORDED AN EFFECTIVE VOTE ON A PROPOSED MERGER/AFFILIATION IN ORDER FOR THE MERGED/AFFILIATED UNION TO BE VESTED WITH BARGAINING AUTHORITY IN THAT UNIT

This Court has decided in *Sea-First* that, for an alleged merged or affiliated union to be vested with its predecessor's bargaining rights, it need not be shown that a majority of *all the employees in the unit* supported the affiliation or merger. Now, therefore, it appears that the Board's due process safeguards must insure only that all *union members* have their democratic rights protected.

The UFCW here, by commingling the ballots of the 389 Venture Store employees with almost 9,000 ballots of employees of other bargaining units, made it impossible to determine whether the URW members in either of the Venture Store bargaining units favored or opposed the merger/affiliation.

The NLRB found this to be of no significance, holding that it was enough, for "due process" to be found, that there had been proper notice of the election, an opportunity to discuss the affiliation, an opportunity to vote, and that secrecy of the ballots had been maintained (A. 41a, 42a).

The Seventh Circuit agreed, stating (A. 11a, 12a) that it is:

> . . . well established that post-merger or post-affiliation unions need not show, as a pre-condition to their recognition, that a majority of employees in a particular employer unit voted in favor of the change. *See, e.g., NLRB v. Eastern Connecticut Health Services, Inc.*, 815 F.2d 517, 518-519 (2nd Cir.), *cert. denied*, 108 S.Ct. 140 (1987).[7]

True, the Second Circuit flatly so stated in *Eastern Connecticut Health Services, Inc.*, but its opinion in that case fails to enunciate any rationale whatever for reaching that conclusion. The Sixth Circuit has held otherwise, in two cases: *NLRB v. Canton Sign Co.*, 457 F.2d 832 (6th Cir. 1972) and *William B. Tanner Company v. NLRB*, 517 F.2d 982 (6th Cir. 1975).

We respectfully submit that whether due process requires that a majority of union members in each appropriate unit have had an effective vote is a significant issue. The National Labor Relations Act, in Section 8(a)(5)

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[7] The reference by the Court to "a majority of employees" is somewhat misleading. The Court is *not*, as might first appear, addressing the *Sea-First* issue. The Court is speaking of a majority of what it had referred to in the sentence preceding the above quotation as "Venture's URW-member employees" – i.e., the union *members* in each unit.

(29 U.S.C. § 158[a][5]) and in Section 9(a) (29 U.S.C. § 159[a]), requires bargaining only *in an appropriate bargaining unit*. That being true, if "due process" is to be, as this Court appeared to recognize, (although admittedly without deciding the issue directly) one of the two criteria for testing the validity of a change in affiliation or a merger, then that "due process" must, we submit, have been followed *within each bargaining unit* for which the merged/affiliated union claims bargaining rights. That means, in turn, that "due process" must guarantee an effective vote by union members within each such bargaining unit. It is not enough that the voting *process* merely avoids procedural irregularities.

What is at the heart of these disputes is the effect of the merger or affiliation on *bargaining rights*. Since bargaining can take place only in a *unit* found by the NLRB to be appropriate, then it would seem to follow, as the night the day, that the due process test must relate to the effectuation of the democratic process among union members *in each bargaining unit*. For that democratic process to be meaningful, "due process" must assure the union members *in each bargaining unit* an effective voice on the affiliation/merger issue.

Voters in Illinois in a political election would surely not believe they had been accorded "due process" in selecting an Illinois Governor if their votes had been commingled with, and hence controlled by, the ballots of voters in a dozen other states.[8] Just as an individual

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[8] A like example closely paralleling the context here may be found in the decision of the Second Circuit in *W. J. Usery v. International Organization of Masters, Mates and Pilots*, 550 F.2d

(Continued on following page)

state's borders define the unit prescribed by law (and due process thereunder) for voting in selecting a state governor, so do the borders of each appropriate bargaining unit determine the unit prescribed by law as to which all matters relating to collective bargaining are to be determined under the National Labor Relations Act.

The Sixth Circuit Court of Appeals, unlike the Second Circuit in *Eastern Connecticut*, has so held in *NLRB v. Canton Sign Co.*, 457 F.2d 832 (6th Cir. 1972). The court there refused to enter a bargaining order under circumstances where union members within each of the separate units had not voted on and approved the union merger. The Seventh Circuit Court of Appeals in footnote 7 of its opinion here (A. 12a) seeks to distinguish this case on the ground that in *Canton*, neither the pre- nor post-merger unions had ever been certified, and there was no showing that the employees had ever chosen to become members

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826 (2nd Cir. 1977), holding that the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401, must be interpreted to guarantee local divisions of international unions the right to control, by their own votes, the selection of their own officers. The Court said, at 827:

> Permitting the members of one Division to vote for the officers of another would be like permitting the residents of a city to vote in the elections of an adjoining town, a situation which we characterized in *Clark v. Town of Greenburgh*, 436 F.2d 770, 772 (2nd Cir. 1971) as an "egregious improbability."

of either the pre- or post-merger unions. These distinctions do not address the central issue of due process.[9]

The true purport of the Court's decision in *Canton Sign* was succinctly summarized by the dissenting judge, who said:

> . . . the majority is necessarily holding that a merger between two local unions affiliated with the same International properly preserves the representative status of the constituent locals only where each bargaining unit represented by the locals holds *separate* elections on the merger issue and separately approves the merger.

Id. at 843.

The case has been so understood by other circuits. As the Fifth Circuit said in *NLRB v. Newspapers, Inc.*, 515 F.2d 334 (5th Cir. 1975) at 338, n.11:

> We note that although in *NLRB v. Canton Sign Co.*, 457 F.2d 832 (6th Cir. 1972) enforcement of the Board's order was denied, it was denied solely on the basis that the record failed to show that the Respondent's employees (who constituted a minority of the membership of the two unions involved) had in fact consented to the merger . . . "

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[9] Nor do these distinctions rest on facts significantly different from those present here. There is no showing that Venture's employees voluntarily chose to become members of either the pre- or post-merger unions. Neither the URW or the UFCW was ever certified in the ten store unit. Although a majority of employees in the Decatur unit voted for certification of the URW, there is no evidence of how many employees in that unit chose to become *members* of either the URW or the UFCW.

If there be any doubt as to the interpretation of the law intended by the *Canton* decision, another Sixth Circuit case lays that doubt to rest.

In *William B. Tanner Company v. NLRB*, 517 F.2d 982, the Sixth Circuit refused to enforce the NLRB's bargaining order entered in *William B. Tanner Company*, 212 NLRB 566 (1974).

When that case was before the National Labor Relations Board, its members had split on the issue, with both the majority and dissenting opinions discussing that question at some length. The majority of the Board said that whether the members *within the affected bargaining unit* had been afforded a vote on the affiliation was "a factor to be considered," but that it was not a "condition precedent for the approval of a merger." *Id.* at 567. Member Kennedy dissented vigorously, reminding the majority, as we here contend, that under Board law, democracy and majority rule must be "considered in terms of the *unit*", citing *North Electric Company*, 165 NLRB 942 (1967), *Newspapers, Inc.*, 210 NLRB 8 (1974), *enf'd.* 515 F.2d 334 (5th Cir. 1975), and *M.A. Norden Company, Inc.*, 159 NLRB 1730 (1966). The Court of Appeals for the Sixth Circuit refused to enforce the Board's order, and quoted, with obvious approval, from Member Kennedy's dissent. *Id.* at 983.

The Seventh Circuit here gave that case short shrift, saying that the Circuit "did not adopt Member Kennedy's dissent." (A. 12a). We respectfully submit that while it is technically true that the Circuit did not expressly "adopt" his dissent, the fact that his dissent was grounded solely on the necessity of consent of union members within the

bargaining unit and that the Court's opinion quoted from his dissent with approval immediately prior to concluding not to enforce the Board order is surely a powerful indication of its endorsement of Member Kennedy's analysis.

The instant decision of the Seventh Circuit, the one Second Circuit decision, and the above described two decisions by the Sixth Circuit are the only Court of Appeals decisions which our research reveals as having passed on this issue. The Sixth Circuit decisions clearly recognize the principle that due process requires offering the union members in each bargaining unit not only the usual procedures of a fair election – i.e., notice, opportunity for discussion, and a secret ballot – but an *effective vote* as the culmination of that process. The absence of any rationale on this issue in the Second Circuit's conclusory statement in *Eastern Connecticut Health Service* leaves the latter opinion an unhelpful one, in our view.

We would urge that, because of the significance of the appropriate bargaining unit context, a requirement of an effective voice by union members in each bargaining unit on affiliation and merger questions is a fundamental "due process" consideration. It does the union members in a bargaining unit precious little good to have notice of an affiliation election, opportunity to discuss the pros and cons of the affiliation, and have their ballots cast in secret if those ballots have virtually no significance in determining whether bargaining in their unit will be conducted by a merged/affiliated or an unmerged/unaffiliated union. This is of particular significance when, as here, the members have lost control of the key bargaining decisions

over proposals, agreements, and strikes because the ultimate authority as to all such matters has, as a result of the merger/affiliation, now been transferred to the hands of distant officers of the International.

But whether or not this court may agree with our contentions in that regard, surely the issue of whether union members in each bargaining unit must be accorded such an effective vote on a union merger in order to satisfy any reasonable "due process" requirement is a matter of significant importance in construing and applying our federal labor laws, and one on which there is a split in the circuits at the present time.

For these reasons, we submit that this issue is one warranting a Writ of Certiorari here.

CONCLUSION

Due to the need for this Court to settle importa
questions of federal law and because the decision of th
Seventh Circuit Court of Appeals in this case is in confli
with the decisions of the Sixth Circuit Court of Appea
on a significant issue of interpretation of federal law, w
respectfully request that a Writ of Certiorari be granted t
review the judgment and opinion of the Court of Appea
of the Seventh Circuit in this proceeding.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Nos. 88-3302 and 89-1065

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC,

Intervenor.

On Petition for Review and Cross-Application
for Enforcement of Orders
of the National Labor Relations Board

ARGUED OCTOBER 24, 1989 – DECIDED FEBRUARY 28, 1990

BAUER, *Chief Judge*, and WOOD and COFFEY, *Circuit Judges*.

BAUER, Chief Judge. Like an old friend – or a bad cold – this case just seems to keep coming back. After a laborious history that has included two previous trips to this court, this 1981 unfair labor practices claim against May Department Stores Company, Venture Stores Division ("Venture") has reached us again. In the instant

matter, Venture petitions for review of an order of the National Labor Relations Board ("NLRB" or "Board"), reported at 289 NLRB No. 88 (June 30, 1988) ("*Board Decision*"), in which the Board found that Venture violated Sections 8(a)(5) and (1) of the Labor-Management Relations Act ("Act"), 29 U.S.C. §§ 158(a)(5) and (1), by refusing to recognize and bargain with the United Retail Workers Union, Local 881 ("Local 881"). The NLRB had responded with a cross-application for enforcement of this order, and Local 881 has intervened. In what we hope is our final visit from this case, we deny Venture's petition and grant the Board's cross-petition for enforcement, for the reasons discussed below.

I.

The facts of this dispute, to which the parties stipulated long ago, have been set forth in detail in the NLRB decision at issue. *Board Decision* at 3-10. For our purposes here, a brief summary of the relevant highlights will suffice.

The dispute centers on the merger/affiliation[1] of two unions: the United Retail Workers Union ("URW"), and

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[1] "Merger/affiliation" is used because the unions used both terms at various times to describe their agreement. The arrangement in this case is probably most accurately termed a "merger," thus we will hereinafter use that term. the label chosen matters little, however; as we noted in our second opinion in this case, the considerations relevant to assessing a merger and an affiliation are the same, at least for the purpose of the issues in this case. *United Retail Workers Union, Local 881 v. NLRB*, 797 F.2d 421, 423 (7th Cir. 1986).

the United Food and Commercial Workers International Union ("UFCW"). Prior to the merger, the URW was an independent union with four locals and about 20,500 members, including 1,214 members employed by Venture. The UFCW was and is an international union affiliated with the AFL-CIO.

In the summer of 1981, the officers of the URW unanimously endorsed a "resolution of merger" between their union and the UFCW. A mail ballot referendum was then called for in which the rank and file members of the URW would be asked to approve the proposed merger. Before the balloting, all URW members received, among other things, a copy of the merger agreement and UFCW's constitution. URW and UFCW officers conducted, after duly notifying all URW members, a number of special information meetings regarding the merger. The URW set up a telephone "hot line" to answer members' questions about the merger. In addition, URW and UFCW officers sent explanatory information to all employers with employees represented by the URW ("covered employers"), including Venture.

On July 31, a direct mail service hired by URW mailed secret ballots, return envelopes and instructions to all individuals eligible to vote on the merger.[2] All ballots

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[2] To be included in the pool of eligible voters, an individual had to be either an active URW member employed by a covered employer as of the last payroll date prior to July 31, 1981, or a nonmember employed by a covered employer as of the last payroll date prior to July 31, 1981, who had not completed but would complete his/her 30-day probationary period before July 31, and from whom the URW had received a membership application before July 31.

were to be returned to LaSalle Bank, which had bee appointed to receive and tally the ballots, by the close business on August 20. On August 21, LaSalle Ba opened and tabulated the ballots. It reported that 6,82 or approximately 74 percent, of the ballots validly cas were cast in favor of the merger, with 2,344, or about percent, against. It was also determined that, of the 1,2 Venture employees who were sent ballots, 389 sent the in. However, because all the ballots were commingled f counting purposes, it was and is impossible to determi how these 389 employees – or, indeed, how t employees of any single bargaining unit voted.

Under the terms of the merger agreement approved in the referendum, the whole of the UR became Local 881, "an autonomous, local union charter by the UFCW," with the URW's former four loca redesignated as "administrative districts" of Local 8 Local 881 retained all URW property and assets, inclu ing the URW treasury. The agreement provided that Lo 881 would be governed by both the UFCW constituti and its own set of by-laws, with any conflicts bei resolved in favor of the by-laws, at least for the first thr years. Local 881 would be directed by three officers, general executive board composed of these officers a twenty-two vice-presidents, and an executive coun composed of the three officers and eight of the twen two vice-presidents. The merger agreement provid that, for the first three-year term, these positions wou be filled entirely by former officers of the UR

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[3] According to the bank's tally, 68 ballots were "invali in addition, 119 ballots were returned as undeliverable.

Specifically, the former National Executive Director of the URW would become the President of Local 881; URW's National Vice President/Treasurer would become Local 881's Secretary/Treasurer; URW's Director of Education would become Local 881's Recorder; all the members of URW's board of governors would become the vice-presidents on Local 881's general executive board; and the supervisors from URW's professional staff would become the eight vice-presidents who also sit on Local 881's executive council.[4]

Under the merger agreement, the collective bargaining agreements already in place between the URW and the covered employers would remain unchanged, and the officers of Local 881 (who were identical to the former officers of the URW) would continue to administer these agreements. Under Local 881's by-laws, future collective bargaining agreements would continue to be negotiated on the local level, and contracts would continue to be ratified by a majority of the affected local membership, with UFCW reserving the right to request that initial bargaining proposals and the resulting agreements be submitted to the UFCW president before their submission to the general membership. Local 881 would have the exclusive authority to interpret and enforce the collective bargaining agreement, to submit grievances to arbitration, and to withdraw or settle grievances. Further, just as the URW had required a two-thirds vote of the affected membership present at a special meeting to authorize a strike, Local 881 would require the same, with one added

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[4] The parties stipulated that Local 881 has also retained the remainder of URW's professional staff.

wrinkle: any strike would have to then be approved by the UFCW. Local 881 also retained the authority to set its own dues. However, the procedure would be changed in that, whereas URW dues were set by the stewards, Local 881's dues would be set by majority vote of its members and would be subject to the minimums set forth in the UFCW constitution and the approval of the UFCW. Unlike the URW, the UFCW charges its locals a per capita monthly tax, but the merger agreement exempted Local 881 from such charges for three years.

After the merger referendum results were certified and reported, all covered employers recognized Local 881 as the valid successor to the URW and honored existing collective bargaining agreements – all covered employers, that is, except Venture. Venture asserted that it need not recognize or bargain with Local 881 because non-URW-member employees of the covered employers were not permitted to vote in the merger referendum, citing the "*Amoco* rule." *See Amoco Production Co.*, 262 N.L.R.B. 1240 (1982), *aff'd sub nom. Local Union No. 4-14, Oil, Chemical & Atomic Workers International v. NLRB*, 721 F.2d 150 (5th Cir. 1983).[5] Under this rule, the Board would not require an employer to bargain with a post-merger or post-affiliation union unless it determined, as a threshold matter, that *all* employees in the bargaining unit, not merely union members, were permitted to vote on the change.

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[5] For a thorough and then-current discussion of the troubled history of the *Amoco* rule, in which the Board itself reversed its position no fewer than three times, see our first opinion in this case, *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752, 755-58 (7th Cir. 1985).

Back in 1984, the NLRB agreed with Venture, and ruled that, pursuant to the *Amoco* rule, Venture did not violate the Act by refusing to recognize Local 881 because non-URW-members were not permitted to vote in the merger referendum. *May Department Stores Co.*, 268 N.L.R.B. 979 (1984). Local 881 petitioned this court for review and, in our first crack at this case, we affirmed. *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7th Cir. 1985). After examining the split that then existed in the federal courts of appeals and the conflicting policies involved, we held that the Board's decision to adopt and apply the *Amoco* rule was rational and consistent with the Act. *Id.* at 758-64. Local 881 pressed on, however, and petitioned the Supreme Court for a writ of certiorari.

While Local 881's petition was pending, the Supreme Court issued its opinion in *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986) ("*Sea-First*"), an appeal from a decision of the Ninth Circuit. In *See-First*, the Court held that "the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." *Id.* at 209 (footnote omitted). The Court explained that the *Amoco* rule "violated the policy Congress incorporated into the Act against outside interference in union decisionmaking." *Id.* at 204 (citations omitted). In light of *See-First*, the Court granted Local 881's petition for a writ of certiorari, vacated our judgment, and remanded the case to us for further consideration. *United Retail Workers Union, Local 881 v. NLRB*, 475 U.S. 1138 (1986).

On remand, we found that the Board had similarly exceeded its authority by rejecting the URW/UFCW merger because nonunion employees could not vote. We therefore granted Local 881's petition for review and reversed the NLRB's decision to adopt and apply the *Amoco* rule. *United Retail Workers Union, Local 881 v. NLRB*, 797 F.2d 421, 422-23 (7th Cir. 1986). We expressed no opinion, however, as to the propriety of other aspects of the merger, and remanded the case to the Board for further proceedings. The Board then reconsidered the matter and issued the decision and order at issue here.

With the elimination of their *Amoco* rule-based objection, Venture had to establish some other fatal defect(s) in the merger if it was to escape a finding by the Board that Venture's refusal to recognize Local 881 was an unfair labor practice. To this purpose, Venture presented to the Board two new attacks on the merger: 1) the URW's failure to conduct the merger referendum on a unit-by-unit basis violated the employees' due process rights, and 2) the merger sufficiently altered the identity of the union that "continuity of bargaining representative" has not been preserved. The Board rejected both of these purported defects, and found no "question concerning representation," *see Sea-First*, 475 U.S. at 202-03 § 207, that would justify Venture's actions. *Board Decision* at 11-16. The Board therefore found that Venture had engaged in unfair labor practices in violation of the Act and ordered that, among other things, Venture must now recognize and bargain with Local 881. *Id.* at 16-21. Venture then filed a post-decision motion requesting that the Board reopen the record to receive certain "newly discovered

evidence." On October 25, 1988, the Board denied this motion.

Venture filed a timely petition to this court, challenging both the Board's finding that the merger was proper and the Board's refusal to reopen the record. We have jurisdiction over this petition, and over the NLRB's cross-petition for enforcement, under § 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e) and (f).

II.

We note at the outset that Venture is not entitled to a *de novo* consideration by this court of its unsuccessful challenges to the merger. The core issue here is whether the merger raises a "question concerning representation," which occurs when "it is unclear whether a majority of employees continue to support the reorganized union." *Sea-First*, 475 U.S. at 202. The Board makes two central findings which determine this issue: whether the merger/affiliation election was conducted with adequate due process safeguards, and whether there is "substantial continuity" between the pre- and post-merger unions.[6] Such determinations are very fact-specific, and are to be made

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[6] Although the Court in *Sea-First* discussed this traditional two-pronged test, it neither endorsed nor rejected it, as the issue before the Court was not the propriety of the Board's past approaches but the new "*Amoco* rule." 475 U.S. at 198-201, 199 n.6 & 200 n.7. The Board has continued after *Sea-First* to consider both due process and continuity, though with a decided emphasis on the latter. *See, e.g., Quality Inn Waikiki*, 297 N.L.R.B. No. 71 (1989); *Seattle-First Nat'l Bank*, 290 N.L.R.B. No. 72 (1988), *enforced*, 892 F.2d 792 (9th Cir. 1989).

in the first instance by the Board. We will defer to and enforce the Board's findings on these issues unless the petitioner establishes that they are not supported by substantial evidence on the record as whole. *See Seattle First National Bank v. NLRB*, 892 F.2d 792, 797 (9th Cir. 1989); *NLRB v. Insulfab Plastics, Inc.*, 789 F.2d 961, 965 (1st Cir. 1986). *See generally David R. Webb Co., Inc. v. NLRB*, 88 F.2d 501, 503 (7th Cir. 1989) (discussing standards of review for NLRB findings and conclusions); *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989) (same).

A. Due Process

The NLRB has long held that an employer's bargaining obligation continues after a merger or affiliation only if the union members were given a fair opportunity to consider and vote on the change. This requirement has traditionally involved the Board in examining whether the relevant election was conducted in accordance with "due process safeguards," including, particularly, notice of the election to all eligible voters, an adequate opportunity for discussion prior to the vote, and reasonable precautions to maintain the integrity and secrecy of the ballot. *See, e.g., F.W. Woolworth Co.*, 285 N.L.R.B. No. 119 slip op. at 3 (1987), *enforced*, No. 88-3150 (4th Cir. Dec. 27, 1989) (available on WESTLAW at 1989 WL 156897); *Newspapers Inc.*, 210 N.L.R.B. 8, 9 (1974), *enforced*, 515 F.2d 33 (5th Cir. 1975); *Equipment Mfg., Inc.*, 174 N.L.R.B. 419 419-20 (1969). In this case, the Board applied this due process test to the stipulated facts regarding the conduct of the URW/UFCW merger referendum. After cataloguing the various pre-merger mailings and meetings and

the handling and tallying of the secret ballots, the Board concluded as follows:

> The foregoing events make it clear that URW members, including [Venture's] employees, were given sufficient notice of the election, an opportunity to discuss and make an informed decision regarding affiliation, and an opportunity to vote. It is equally clear that the integrity and secrecy of the ballots were maintained. Accordingly, we find that due process was observed in the conduct of the referendum.

Board Decision at 13.

Venture does not challenge the Board's application of this traditional due process inquiry, nor does it challenge the Board's finding based on that inquiry. Instead, Venture suggests that an additional requirement should be added to the test. Venture asserts that the Board should require, "as a threshold condition of recognizing the validity of the affiliation election, that employees in each unit be given a separate opportunity to vote on the affiliation issue." Thus, the URW should have had to segregate and tally the merger ballots on a unit-by-unit or employer-by-employer basis.

While we applaud Venture's apparent concern for its employees' due process rights, we agree with the Board's conclusion that "there is no merit to [Venture's] contention that it has no duty to bargain with [Local 881] because, as a result of the commingling of ballots in the affiliation vote, the precise vote [by Venture's URW-member employees] cannot be known." *Board Decision* at 13. It has been and continues to be well established that post-merger or post-affiliation unions need not show, as a precondition to their recognition, that a majority of

employees in a particular employer unit voted in favor of the change. *See, e.g., NLRB v. Eastern Connecticut Health Services, Inc.*, 815 F.2d 517, 518-19 (2d Cir.), *cert. denied*, 108 S.Ct. 140 (1987) ("since the affiliation decision was primarily an internal matter for the union, [citing *Sea-First*, 106 S.Ct. at 1015-16], no question of representation is raised by the union's decision not to require unit-by-unit approval of the changes"); *House of the Good Samaritan*, 248 N.L.R.B. 539, 539 (1980) ("where, as here, complete continuity in representation has been maintained, a separate vote by Respondent's employees is not required"); *Aurelia Osborn Fox Memorial Hospital*, 247 N.L.R.B. 356, 359 (1980) (same) (citing *American Enka Co.*, 231 N.L.R.B. 1335, 1337 (1977)). The Board also routinely approves union organizational changes in which members' votes are collected on a multi-unit basis and the ballots are considered collectively. *See, e.g., F.W. Woolworth Co.*, 285 N.L.R.B. No. 119, ALJ decision at 10; *American National Insurance Co.*, 281 N.L.R.B. 713, 714 n.2 (1986); *Montgomery Ward & Co., Inc.*, 188 N.L.R.B. 551, 551-52 (1971).[7]

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[7] Venture's reliance on *William B. Tanner Co. v. NLRB*, 517 F.2d 982 (6th Cir. 1975), is misplaced. The Sixth Circuit did there deny enforcement to a Board order which held, over Board Member Kennedy's dissent, that a post-merger local was a qualified successor to the pre-merger local. *William B. Tanner Co.*, 212 N.L.R.B. 566 (1974). The court did *not*, however, explicitly adopt a unit-by-unit vote-counting requirement for merger elections, nor did it adopt Member Kennedy's dissent, as Venture suggests. The other cases cited by Venture are similarly inapposite. In most of them, the fatal problem with the union's organizational change was that it was unclear whether employees of a particular unit or units were given an equa

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Apart from its lack of precedential support, Venture's suggested requirement is also inconsistent with the spirit, if not the letter, of *Sea-First*. In *Sea-First*, the Supreme Court recognized, that industrial stability, the concern underlying the Act, "would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." 475 U.S. at 202-203 (quoting *Canton Sign Co.*, 174 N.L.R.B. 906, 909 (1969)). The Court also stated that "[the Act] does not require unions to follow specified procedures in deciding matters such as affiliations," 475 U.S. at 199 n.6, and that "[the Board] has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections," *Id.* at 207-08. Venture's suggested requirement would force the Board to micro-manage the collection and tallying of union

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opportunity to vote in a commingled, multi-unit election. *See, e.g., Rinker Materials Corp.*, 162 N.L.R.B. 1688 (1967); *Yale Manufacturing Co.*, 157 N.L.R.B. 597 (1966). It is undisputed here that Venture's employees had an adequate and equal opportunity to vote. The remaining cases are simply factually distinguishable. *Insulfab Plastics* involved a single-unit union, which explains the out-of-context quotation supplied by Venture: "employees in the bargaining unit [i.e. *all* the employees involved] must have had a fair opportunity, with adequate due process safeguards, to approve the organizational change." 789 F.2d at 965. In *NLRB v. Canton Sign Co.*, 457 F.2d 832 (6th Cir. 1972), neither the pre- or post-merger unions had ever been certified as the bargaining agent for Canton Sign Co.'s employees, and there was no evidence that any of these employees had ever chosen to become a member of either the pre- or post-merger unions. *Id.* at 834.

referendum ballots in direct contradiction to these admonitions and to the general message of *Sea-First* that affiliations or mergers, like a union's decision to alter its own constitution, are basically internal union affairs. *See Id.* at 206.[8] The Board in this case properly recognized the message of *Sea-First* when it rejected. Venture's suggested unit-by-unit voting requirement: "[A]n employer has no more right to seize the occasion [of a merger or affiliation] for questioning majority sentiment in the unit than it would have if the bargaining representative had simply changed its own constitution." *Board Decision* at 13 (citing *Sea-First*).

Substantial record evidence supports the Board's finding that the procedures under which the URW/UFCW merger was conducted comport with due process and precedent and sound reasoning support the Board's decision to reject Venture's suggested additional requirement. We therefore accept the Board's due process finding.

B. Continuity

The second condition the NLRB has traditionally placed on an employer's duty to bargain with a post-merger union is "substantial continuity" between the pre-

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[8] To the extent that *Tanner, supra* note 7, may conflict with our decision here and the Second Circuit's decision in *Eastern Connecticut Health Services*, 815 F.2d 517, we note that the latter two have been decided after the Supreme Court set out these statements in *Sea-First*, while the former was decided prior to *Sea-First*.

and post-merger unions. In making the continuity determination, the Board generally compares the entities in light of a number of factors, including "structure, administration, officers, assets, membership, autonomy, bylaws, size, and territorial jurisdiction," *NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1111-1112 (1st Cir. 1975), with an eye toward changes in the "rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer." *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 857 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978). *Accord National Posters, Inc. v. NLRB*, 885 F.2d 175, 179 (4th Cir. 1989) (discussing the same continuity test); *Insulfab Plastics*, 789 F.2d at 966 (same). No strict check-list is used, however. The Board considers " 'the totality of a situation.' [*Yates Indus., Inc.*, 264 N.L.R.B. 1237,] 1250 [(1982)]. Continuity is evidenced by the maintenance of traces of a preexisting identity and the retention of autonomy over the day-to-day administration of bargaining agreements." *News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989).

In *Sea-First*, the Supreme Court highlighted the importance of continuity by equating the "question concerning representation" inquiry with a concern for "changes [that] are sufficiently dramatic to alter the union's identity." 475 U.S. at 206. Since *Sea-First*, the Board has continued to examine the same kind of factors, though it has seized on *Sea-First*'s language and rephrased the continuity inquiry as a search for changes that are "sufficiently dramatic to alter the union's identity." *See, e.g., Seattle-First National Bank*, 290 N.L.R.B. No. 72, slip op. at 3-9 (1988), *enforced*, 789 F.2d 792 (9th Cir.

1989); *Garlock Equipment Co.*, 288 N.L.R.B. No. 31, slip op. at 3-6 (1988); *Western Commercial Transport*, 288 N.L.R.B. No. 27, slip op. at 6-13 (1988).

In this case, the Board similarly conducted a comparative analysis of the pre- and post-merger unions in search of a "dramatic alteration of identity." *Board Decision* at 14-16. The Board began by noting that the record established a "slight diminution in autonomy in relation to the UFCW International." *Id.* at 14. The Board then reviewed the following specific features of the URW/UFCW merger: the Local 881 officers were identical to the officers elected to run the URW; the authority of these local officers to negotiate agreements, fashion proposals and discipline members remained constant; the authority of Local 881 members to ratify collective bargaining agreements and call strikes was "virtually identical" to that of URW members; Local 881 retained all URW property and assets; there was no evidence of a merger-related dues increase; former URW members in good standing automatically became Local 881 members; and Local 881 stood ready to assume all agreements between the URW and the covered employers, including Venture, and attempted to do so. *Id.* at 15. The Board ultimately concluded as follows: "In view of the retention of local officers and assets and the corresponding evidence showing that there has been no substantial impairment or reduction of local autonomy, we find that continuity of representation has been preserved." *Id.* at 16.

As we noted above, Venture, as the party challenging this finding, has the burden of establishing that it is not supported by substantial evidence on the record as a whole. *See News/Sun Sentinel*, 890 F.2d at 432 (challenging

employer has burden of proving discontinuity, and Board findings regarding continuity are conclusive if supported by substantial record evidence) (citing *Insulfab Plastics*, 789 F.2d at 966). To this end, Venture focuses on three provisions of the URW/UFCW merger agreement and/or the UFCW constitution which it claims work a "dramatic shift" in continuity: 1) the right of the UFCW to review bargaining proposals and final agreements before their submission to the Local 881 members, 2) the fact that the UFCW must authorize any local strikes, and 3) the fact that Local 881's dues are subject to UFCW minimums and approval by the UFCW president.[9]

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[9] We disregard Venture's contention that the mere difference in numerical and geographic size between the URW and the UFCW "demonstrates a significant diminution in the ability of the union to represent the interest of its members." If this argument was accepted, every merger of affiliation of a small independent union with an international would, *per se*, raise a question concerning representation. Yet, the increased size, financial support and bargaining power that such mergers create are the very factors recognized by the Supreme Court in *Sea-First* as the ordinary, valid reasons for mergers. 475 U.S. at 198-99 & 199 n.5. In this way and others, the Court in *Sea-First* strongly suggested that, without some actual evidence of loss of continuity, most mergers between independent unions and internationals do not raise a question concerning representation. To the extent that the trilogy of Third Circuit cases cited by Venture, *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3d Cir. 1978); *NLRB v. Bernard Gleockler N.E. Co.*, 540 F.2d 197 (3d Cir. 1976); and *American Bridge Div., U.S. Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972), support Venture's suggested *per se* rule, they are of questionable precedential value in light of *Sea-First*. *See Seattle-First Nat'l Bank*, 892 F.2d at 797-98 (rejecting the argument that the affiliation of a small independent with an international *per se* destroys continuity and raises a question

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Faced with these same arguments by Venture, the Board found that "these reserved rights of approval, allowing the [UFCW] only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs." *Board Decision* at 16. Substantial record evidence supports this finding. First, the record reflects that primary control over the negotiation and implementation of collective bargaining agreements is vested in Local 881's officers and that the ultimate authority to reject or accept agreements lies with the local members. True, the UFCW can request that initial proposals and final agreements be submitted to it for approval, and it can assign a representative to assist the local officials in bargaining. However, the proposals and ultimate agreements are developed, negotiated and ultimately approved or rejected entirely on the local level. Second, the record reflects that the strike-authorization procedure was not altered significantly by the merger. Both before and after the merger, a two-thirds vote of the affected membership is required to call a strike. Although the UFCW constitution requires that the UFCW president must also approve a local strike, the principle consideration of the merits of a strike determination remains in the hands of the affected members. Third, with regard to setting dues, the local membership

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concerning representation, and discussing doubt, as to continuing validity of Third Circuit cases after *Sea-First*); *Insulfab Plastics*, 789 F.2d at 967-68 (same). *See also News/Sun Sentinel*, 890 F.2d at 433 ("If, as in this case, sufficient indicia of continuing autonomy are present, numerical disparities in voting strength will not force a finding of discontinuity.")

again retained primary authority, limited only by the minimums set forth in the UFCW constitution (a document with which the URW members were provided before voting on the merger) and the UFCW president's approval. Moreover, the Board's continuity determination finds additional support in other aspects of the merger already noted, most particularly the fact that Local 881's leadership is identical in personnel and authority to that of the URW, and that these identical officers retained the exclusive authority to interpret and enforce the collective bargaining agreement and to handle grievances.

Thus, as Venture had failed to establish that the Board's continuity finding is not supported by substantial record evidence, we accept that determination, as well as the Board's ultimate conclusion that the URW/UFCW merger does not raise a question concerning representation. *Cf. Seattle-First National Bank*, 892 F.2d at 799-802 (affirming Board determination that sufficient continuity was present and that no question concerning representation was raised on facts quite similar to those here); *Insulfab Plastics*, 789 F.2d at 966-68 (same).[10]

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[10] Venture points for support to two NLRB cases contemporaneous with the Board's decision here in which continuity was found to be lacking and which, it asserts, involved "strikingly similar facts." *Garlock Equipment*, 288 N.L.R.B. No. 31 (1988); *Western Commercial Transport*, 288 N.L.R.B. No. 27 (1988). A review of these cases, however, reveals that they arose from markedly different facts than involved here. In *Garlock Equipment*, an "amoeba-simple" independent union confined to the employees of a single company became part of an existing district lodge (rather than becoming a self-contained, autonomous local of the International as the URW did

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C. The Refusal to Reopen the Record

Apart from its challenges to the propriety of the merger, Venture also takes issues with the Board's denial of its motion to reopen the record. NLRB regulations provide that the Board may reopen the record and conduct a new hearing when a part presents evidence "which has become available only since the close of the hearing," and which, "if adduced and credited, . . . would require a different result." 29 CFR § 102.48(d)(1). The requesting party must also explain why the evidence was not presented previously. *Id.* The decision to grant or deny a new hearing under this rule is within the sound discretion of the Board, and will only be disturbed by a reviewing court if the challenging party establishes an abuse of discretion. *See Seattle-First National Bank*, 892 F.2d at 797; *Hercules, Inc. v. NLRB*, 833 F.2d 426, 430 (2nd Cir. 1987); *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380-81 (9th Cir. 1987). This Venture has failed to do.

Venture's motion argued that Venture possessed "newly discovered additional evidence" concerning the

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here). 288 N.L.R.B. No. 31, slip op. at 3-4. Further, the officers and members of the former independent effectively lost all power to negotiate collective bargaining agreements to the officers of the district lodge. *Id.* at 5. *Western Commercial Transport*, too, involved the submersion of a single-employer independent into an existing district lodge, with the members of the old unit receiving no effective power to choose their delegates and representatives. 288 N.L.R.B. No. 27, slip op. at 6-7, 9-10. Moreover, unlike here, in *Western Commercial Transport* the incumbent officers were replaced by individuals from the international who had no previous connection with the unit, and these individuals managed day-to-day representation matters. *Id.* at 6-9.

number of Venture employees still represented by what was the URW. Venture contended that this evidence if believed, would show that this number had "drastically declined" since the merger referendum, and that therefore the Board's bargaining order was an inappropriate remedy. In an unpublished decision and order, the Board denied Venture's motion for two reasons: 1) Venture did not contend that Local 881 had lost majority support, only that support had "drastically declined;" thus, the additional evidence, even if accepted, would not require a different result, and 2) even viewing Venture's allegation as one of a loss of majority support, the policies of the Act do not allow an employer (such as Venture) who has unlawfully withdrawn recognition to rely on the delay-related changes caused by that withdrawal to question the union's continuing majority status.[11] These Board conclusions are quite reasonable and well within the Board's discretion.

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[11] The Board also distinguished *Impact Industries, Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1988), the case on which Venture primarily relies, on the ground that at issue there was the propriety of a "*Gissel* order," which is an extraordinary remedy to be used to force employers to bargain with unions that have not won representation elections because the employer's pre-certification-election unfair labor practices have made a fair election unlikely. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *See also NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1270 (7th Cir. 1978) (distinguishing the *Gissel* order context). In this case, by contrast, Venture has been ordered to bargain with a successor to the incumbent union from which Venture withdrew recognition during the term of a collective bargaining agreement. We agree with the Board's conclusion that *Impact Industries* is inapposite.

Venture's request by its own terms does not meet the requirements of 29 CFR § 102.48(d)(1) in that it does not allege the existence of newly discovered evidence which "would require a different result." A reduction in support, even if "drastic," would not render a bargaining order inappropriate unless it raised a good faith doubt as to the union's majority status, an allegation which Venture has not made. *See Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1141 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974) ("Numerous cases hold that employee turnover, standing alone, does not give rise to good faith doubts regarding a union's majority status."); *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1300-01 (D.C. Cir. 1988). Further, the Board's policy-based rejection of Venture's request is reasonable and well-supported. As this court and others have often noted, to allow employers to avoid bargaining orders by pointing to changes in the bargaining unit that have occurred because of the delay attendant to their continued refusal to recognize the union would "put a premium on protracted litigation by encouraging employers to delay compliance in the hope that new and favorable circumstances would develop." *Cutter Dodge, Inc.*, 825 F.2d at 1381. *See also NLRB v. Aquabrom*, 855 F.2d 1174, 1184-85 (6th Cir. 1988) ("A union's support will usually erode over time, particularly where, as here, the union has never been given the chance to succeed. . . . [T]o permit [the employer] to rely on this inevitable erosion in a union's support [as a defense to a bargaining obligation] removes any incentive the [employer] might have to honor, without Board intervention, a remedial obligation, and, further, encourages litigation and rewards delay."); *Western Temporary Services*, 821 F.2d at

1270 (allowing changes in union membership caused by litigation-related delay to remove employers' duty to bargain "might encourage employers to file unmeritorious motions in the hope of eventually being relieved of their duty to bargain, either through sheer lapse of time or through inevitable employee turnover").[12]

III.

Over eight years ago, the officers and members of the URW decided to merge their union with an international. Because Venture, only one of the companies with employees represented by the URW, disapproved of the merger, this long dispute has resulted. With the abolition of the *Amoco* rule, there is now no good reason to allow Venture to further delay in recognizing and bargaining with Local 881. Indeed, the cost and delay that have already been occasioned by this dispute provide persuasive support for the point finally and firmly stressed by the Supreme Court in *Sea-First*: union decisions to merge or affiliate should normally remain internal union matters out of which employers, the NLRB and the courts should stay. This sound rule of thumb should only be broken when there is real doubt as to the fairness of the procedures by which the merger or affiliation was approved, or when the merger or affiliation so changed the structure and function of the union that there is real

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[12] Because we find reasonable the Board's articulated reasons for rejecting Venture's motion, we need not address Intervenor's additional argument that Venture has failed to show that (and why the proffered evidence was previously unavailable.

doubt as to whether the resulting entity is "continuous" with the one elected by the members. The Board determined here that the URW-UFCW merger raised no such doubts or "questions concerning representation." Because this determination is supported by substantial evidence on the record as a whole, and because the Board did not abuse its discretion when it refused to reopen the record, Venture's PETITION FOR REVIEW is DENIED, and the NLRB's CROSS-PETITION FOR ENFORCEMENT is GRANTED.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 11, 1990.

Before

Hon. WILLIAM J. BAUER, CHIEF JUDGE

Hon. HARLINGTON, WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

MAY DEPARTMENT STORES COMPANY, VENTURE STORES DIVISION,	)	Application for Enforcement and Petition for Review of an Order of the National Labor Relations Board.
Petitioner, Cross-Respondent,	)	
Nos. 88-3302 89-1065 vs.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent, Cross-Petitioner,	)	
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881,	)	
Intervenor.	)	

ORDER

On consideration of the petition for reconsideration *en banc* in the above-entitled cause filed by the petitioner, cross-respondent, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition.

IT IS HEREBY ORDERED that the aforesaid petition for reconsideration *en banc* be and the same is hereby DENIED.

APPENDIX C

SBC

289 NLRB No. 88 Issued June 30, 1988 D – 7080
Chicago and
Decatur, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAY DEPARTMENT STORES
COMPANY,
VENTURE STORES DIVISION

and

UNITED RETAIL WORKERS
UNION LOCAL NO. 881,
CHARTERED BY UNITED
FOOD
AND COMMERCIAL WORKERS
INTERNATIONAL
UNION, AFL – CIO, CLC

Cases 13 – CA – 21660
13 – CA – 21696

DECISION AND ORDER

On February 17, 1984, the National Labor Relations Board issued its Decision and Order[1] in these proceedings, finding that the November 1, 1981 affiliation between the United Retail Workers Union (URW) and the United Food and Commercial Workers International Union, ALF – CIO, CLC (UFCW) was improper because unit employees who were not members of URW were not given an opportunity to vote in the affiliation referendum. Accordingly, the Board found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing, among other things, to recognize the affiliated

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[1] 268 NLRB 979.

entity, i.e., the Charging Party (Local 881). The Board's Order dismissing the complaint was enforced sub nom. by the Seventh Circuit Court of Appeals.[2] Thereafter, on April 28, 1986, in light of its decision in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192, (1986), the United States Supreme Court vacated the decision of the court of appeals and remanded the case to that court for further consideration. On reconsideration, the court of appeals on July 25, 1986, issued its decision,[3] holding that the Board cannot require the URW "to allow nonunion employees to vote on the merger before ordering [the Respondent] to bargain with the post-merger union."[4] Without expressing views on whether the affiliation referendum was conducted with sufficient due process or whether there is sufficient continuity between the unions, or on any other remaining issues, the court of appeals remanded the case to the Board for further proceedings consistent with its opinion.

Following acceptance of the remand from the court of appeals, the Board notified the parties that they could file position statements with the Board. On November 10, 1986, the Respondent and counsel for the General Counsel each filed a timely statement of position, and the Respondent filed a Motion for Summary Judgment and a

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[2] *Retail Workers Local 881 v. NLRB*, 774 F.2d 752 (7th Cir. 1985).

[3] 797 F.2d 421 (7th Cir. 1986).

[4] Id. at 423. The court noted that the relevant considerations in both "merger" and "affiliation" cases are the same.

Statement of Material Facts. UFCW filed a position statement of November 14. On November 20 and 28, respectively, counsel for the General Counsel filed his response in opposition to the motion and the Respondent filed its reply to the response.[5] Thereafter, following the Board's issuance of its Decision and Order in *Western Commercial Transport*, 288 NLRB No. 27 (Nov. 6, 1987), the UFCW requested permission to file a second position statement. The Board granted all parties in this proceeding an opportunity to file statements of position in light of the recent decision in that case, and all parties have exercised the opportunity to do so.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[6] in light of the position statements and briefs, and finds that the 1981 affiliation of URW with the UFCW was proper and that the Respondent has violated Section (a)(5) and (1) of the Act, as alleged, by taking the following actions: refusing to bargain with Local 881; engaging in direct dealing with

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[5] In view of the procedural history of this case and the decision reached here, the Respondent's motion is denied.

[6] Per stipulation by the Respondent, Local 881, and the General counsel, the record in this case consists of the charges, the consolidated complaint, the answer, and the stipulation of facts, with attachments, entered into by the parties and approved by the Board on April 23, 1982. (See 268 NLRB 979.) In the stipulation, the parties waived a hearing before an administrative law judge, agreed that oral testimony was neither necessary nor desired, and reserved the right to object to the materiality, relevance, or competence of any of the stipulated facts.

employees; unilaterally terminating the grievance procedures set forth in the applicable collective-bargaining agreements and refusing to process grievances; refusing to grant Local 881 representatives access to stores; refusing to provide information about newly hired employees as required by the collective-bargaining agreements; and unilaterally changing the dues-checkoff provisions set forth in the collective-bargaining agreements and refusing to transmit to Local 881 dues and initiation fees deducted from employees' paychecks.

The Affiliation Referendum

The facts regarding the conduct of the affiliation referendum are set forth briefly in the Board's decision at 268 NLRB 979. The Respondent has recognized the URW as the exclusive bargaining representative of employees in its 10 Chicago area stores and its store in Decatur, Illinois, since 1978.[7] The most recent collective-bargaining agreement between the Respondent and URW covering the Chicago stores was effective from July 21, 1980, through July 24, 1983. The most recent collective-bargaining agreement between the Respondent and URW covering the Decatur store was effective from January 1, 1981, through December 31, 1983. As discussed in more detail below, the Respondent failed to adhere to certain terms of the agreements following November 1, 1981.

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[7] In 1978, the Respondent recognized URW following the purchase of certain Turnstyle Stores from Jewel Companies, Inc. In 1962 Jewel had voluntarily recognized URW as the representative of its Chicago area Turnstyle employees and later recognized URW as the representative of its Decatur location employees pursuant to Board certification in 1972.

In January 1981[8] and for approximately 6 months thereafter, URW National Executive Director Fred Burki and URW National Vice President/Treasurer Frank Koukl investigated the possibility of URW's affiliating with UFCW and met with UFCW officials. On June 11, Burki and Koukl presented their affiliation plan to, and received the unanimous approval of, the four URW local presidents. On June 22, UFCW International President William Wynn and URW's executive council, staff supervisors, and Board of governors met and, with the exception of two absent persons who later gave their approval, unanimously endorsed and signed a "resolution of merger," adopting the proposed merger agreement between URW and UFCW. Thereafter, on June 23, Burki notified the Respondent that URW intended to seek affiliation and sent all URW members a letter informing them of the governing bodies' decision and recommendation on affiliation and explaining the reasons for it. On June 24 and 25, Burki held a press conference attended by officials of both unions to announce a mail ballot referendum on the affiliation question, and notified all stewards about a special affiliation conference scheduled for July 27. On July 1, Koukl sent letters about the special affiliation conference and special membership meetings to be held the same week to all employers with whom URW had collective-bargaining agreements and, under separate cover Burki informed the employers about the proposed affiliation. On July 10, all URW members were mailed a "Notice of Meeting and Mail Ballot Referendum" and a

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[8] All dates refer to 1981 unless otherwise indicated.

copy of the merger agreement and appendices,[9] and 4 days later reminders of the special meetings and the referendum were posted at all employers' facilities. Stewards and local union officers attended the special affiliation conference on July 27, and affiliation meetings were conducted, as announced, twice a day on July 28 through 31. The latter meetings were open to all URW members and the members were given an opportunity to question URW and UFCW officials about the affiliation.

On July 31, Walenza Direct Mail mailed affiliation referendum ballots with instructions and return envelopes enclosed to the 20,548 URW members deemed eligible to vote.[10] The preprinted return envelopes were addressed to LaSalle Bank, which URW had appointed to guard and tally the ballots. Although the return envelopes were imprinted with a store identification number, the ballots themselves bore no identification marks.

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[9] Appendices included the UFCW International constitution.

[10] URW contracted out the printing of ballots and labels as well as the mailing. Of the 22,412 employees represented by URW, the following individuals were eligible to vote:

> a. All active URW members on the payroll of an employer under contract with URW as of the last payroll date prior to July 31, 1981; and b. Nonmembers employed by an employer under contract with URW as of the last payroll date prior to July 31, 1981 who: (1) had not completed but would complete their 30-day probationary period before July 31; and (2) from whom URW had received a membership application before July 31, 1981.

As of the close of business on August 20, the pre-established cutoff date for the election, LaSalle Bank had received 9235 ballots.[11] The following day, the bank opened, commingled, and tabulated the ballots. The tally was 6823 for affiliation and 2344 against it, with 68 ballots declared invalid. Of the 1214 ballots mailed to members in the Respondent's employ, 389 were returned to the bank and tabulated. The URW and the General Counsel acknowledge that because of the commingling of the ballots, they have no way of determining (by employer unit, or store) how the employees voted.

On August 21, URW telephoned the Respondent and other employers under contract with it and informed them of the result of the referendum. By letter dated August 31, the Respondent's vice president, Coleman Peterson, acknowledged receiving a telephone call concerning the results of the referendum, but requested that Burki advise him "officially of the current and future status" of URW, specifically, whether the "merger" was complete and, if not, what further steps were necessary, when any additional steps would be taken, the effective date(s) of the merger, and the tally of ballots among the Respondent's employees. Peterson's letter also stated that the Respondent needed to know that it was "dealing with the proper organization and its authorized representatives" in order to continue "routine" matters such as dues checkoff, handling of new checkoff authorizations, and grievances. Additionally, Peterson stated that he had instructed management to discontinue these functions as

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[11] A total of 119 envelopes containing ballots and instructions were returned to URW as undeliverable.

of September 5 but, pending official notification, would "reinstruct" the managers if the merger was not going to take place or would not be effective until a later date.

In a letter dated September 1, Burki responded that the effective date of the affiliation was November 1, requested that Peterson "reinstruct" the managers to "continue business as usual," and assured Peterson of answers to his questions prior to November 1. In letters dated September 24, Peterson acknowledged compliance with Burki's September 1 requests and Burki formally advised Peterson of the referendum results and the effects of the impending affiliation, including that "[o]n 1 November, the URW will become United Retail Workers Union Local No. 881, affiliated with the [UFCW]." Burki's letter further asserted that there would be no change in URW officers or structure for a period of 3 years, that as a UFCW local, URW would remain autonomous and would continue making all decisions regarding collective bargaining, grievance handling, and arbitration, and that there would be no change in the current collective-bargaining agreements with the Respondent.[12]

On October 16, the Respondent's chairman, Thomas Rafferty, sent the following letter to Burki:

> Venture has been advised of the results of the mail referendum conducted among your membership on the issue of affiliation with the [UFCW]. We understand that among your total membership of approximately 22,000 persons,

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[12] In his letter, Burki also informed Peterson that contract ratification procedures would remain the same and that negotiation committees would be selected as in the past.

there were 6,823 votes cast favoring the affiliation and 2,344 votes opposed to the affiliation. This certainly does not represent an overwhelming level of participation, nor a clear mandate by your membership favoring affiliation.

It is also our understanding that you are unable to separately determine the wishes of Venture associates[13] regarding representation by the UFCW, an issue of vital importance to our associates. We have asked for that information on several occasions and it has not been provided, and we have been led to believe it is unavailable. The history of your union's representation of Venture associates is such that few of them have ever had the chance to express their desires about representation by the URW, and this referendum has now deprived them of an opportunity for self-determination concerning representation by yet another union.

The failure of the URW to conduct a separate referendum among Venture associates is made more unreasonable by the fact that even if all Venture associates had voted, they would have been so outnumbered by your members employed by other larger employers that there is no way the voice of Venture associates could have effectively been heard.

We also understand that voting in the referendum was limited to URW members, a condition that excluded non-members from the opportunity to vote.

In view of these considerations, and others arising out of the substantial difference between an independent [URW] and your new identity as a local of the United Food and Commercial Workers Union, the company has requested that

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[13] The Respondent refers to its employees as "associates."

> the National Labor Relations Board conduct a vote among the associates in our union stores to allow them to indicate their desires regarding future union representation.[14] We will, as of November 1, 1981, suspend transmission of dues and initiation fees to the Union. Naturally, if our associates vote to select Local 881 of the [UFCW] as their bargaining representative, Venture will recognize and deal with that Union, as always in good faith. If on the other hand, they vote to reject such union representation, any union dues and fees deducted from our associates after the effective date of the affiliation . . . will be returned to them. Venture intends to create an escrow account for such purpose. In view of this action, Venture will decline to recognize Local 881 unless and until this question concerning representation is resolved. . . . [Footnotes added.]

Also, on October 16 the Respondent's store managers gave a scripted speech to employees, explaining its position regarding the affiliation, its request for a Board-conducted election, and its planned refusal to recognize Local 881 as the employees' collective-bargaining representative. Further, the Respondent mailed numerous letters to employees regarding its position on the affiliation.

On November 1, in accordance with the merger agreement between URW and UFCW, UFCW granted a charter to the URW officers, and successors "under the title of United Retail Workers Union, Local 881."

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[14] The respondent's request for an election, filed October 16, was dismissed by the Regional Director for Region 13 on December 10 pending resolution of the unfair labor practice charges in this case.

The Pre- and Post-Affiliation Structure of Local 881

Prior to the effective date of the affiliation, URW was composed of four locals, each with a president, vice president, secretary, and sergeant-at-arms elected from among and by the respective local membership. Fourteen of the sixteen local officers were elected to and constituted the board of governors of the URW. Except in their capacity as members of the board of governors, the local leadership had no authority to pledge the credit or disburse funds of the URW or any local, negotiate contracts with employers, file or process grievances pursuant to collective-bargaining agreements, resolve disputes arising among members or locals, or discipline members for violating URW's constitution and bylaws. Although they received no compensation for their services as local officers, they received approximately $150 per month for their services on the board of governors.

Administratively, the URW was further composed of the executive council and its professional staff. National Executive Director Burki and Vice President/Treasurer Koukl were the sole members of the council. The professional staff was made up of nine national officers and supervisors, including the comptroller and vice president of field operations, and nine field representatives. The board of governors and the executive council were responsible for the negotiation and administration of collective-bargaining agreements,[15] the execution and enforcement of contracts necessary for the Union's day-to-day operation, and the resolution of disciplinary

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[15] Burki and Koukl lead all collective-bargaining negotiations.

matters. Pursuant to the URW constitution, collective-bargaining agreements were ratified by a majority vote of affected local members at a meeting called for this purpose.

Following the affiliation, URW's four locals were redesignated as administrative districts of Local 881. In accordance with the merger agreement, Local 881 is run by an executive council and general executive board. Burki, Koukl, and the nine officers and supervisors from URW's professional staff serve on the new executive council. The general executive board consists of the executive council members and all members of the former URW board of governors, i.e., the former URW local officers. Local 881 also retains the identical professional staff of URW. The executive council manages Local 881's daily affairs. The general executive board elects the executive council, conducts disciplinary trials, and hears appeals from Council/Board President Burki's findings in disciplinary proceedings. Burki and designated representatives continue to negotiate collective-bargaining agreements, and contract ratification is by a majority of affected membership; however, the UFCW International reserves the right to approve initial proposals and to approve contracts prior to their submission to members for ratification. Local 881 has the exclusive authority to interpret and enforce its collective-bargaining agreements, including processing, withdrawing, and settling grievances, and submitting them to arbitration.

The URW constitution permitted a strike on a two-thirds vote of the membership present at a special strike meeting. Pursuant to the merger agreement, Local 881 may strike on the two-thirds vote of affected membership

at a special meeting and approval by Local 881's president or the UFCW International. URW dues were set by a simple majority of stewards and delegates attending the URW national convention; whereas, Local 881 members may establish dues at regular or special meetings, subject to minimums set forth in the UFCW constitution and approval by the UFCW president. Unlike the URW, UFCW charges a $4.70 per capita tax monthly. In accordance with the merger agreement, however, UFCW agreed not to institute the tax for a period of 3 years following affiliation.

The Positions of the Parties

The Respondent challenges the legality of the affiliation, asserting that due process was not observed in the conduct of the referendum and that there has been a substantial change in continuity of representative as a result of the affiliation. More specifically, the Respondent contends that a unit-by-unit vote should have been undertaken and that in the absence of proof that a majority of its employees voted in favor of affiliation, it has no obligation to recognize or bargain with Local 881. Further, the Respondent asserts that postaffiliation changes in the administrative structure of URW, as well as changes in, among other things, officers and their authority, dues, and fees and their use, contract ratification procedures, strike approval, and membership disciplinary rules have resulted in a substantial loss of autonomy and give rise to a question concerning representation. The General Counsel contends that due process was safeguarded, that unit-by-unit proof of approval of the

affiliation is unnecessary under the circumstances, and that Local 881 is substantially the same as URW.

Analysis

A. *Due Process*

In conjunction with Section 9(a), Section 8(a)(5) of the Acts provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the exclusive representative of its employees. In matters of affiliation, the Board has long held that an employer's duty to bargain with the employees' representative continues so long as the employees have been given an adequate opportunity to vote and there is continuity in the pre- and post-affiliation representative.[16] In assessing the adequacy of the opportunity to vote on affiliation, the Board has traditionally examined whether due-process safeguards have been met, i.e., whether employees were given notice of the impending affiliation election and a sufficient opportunity to discuss the affiliation and to ask questions about it, and whether precautions were taken to preserve the secrecy of the ballot.

In the instant case, the record establishes that URW undertook elaborate preparations for the conduct of the

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[16] *Financial Institution Employees*, supra. In light of our finding below that the Board's traditional due-process requirements have been met in this case, we find it unnecessary to consider whether, in view of the Supreme Court' opinion in *Financial Institution Employees*, such requirements need be fulfilled in all instances where affiliations occur (id., 472 U.S. at 199 fn. 6).

mail ballot referendum. On June 23, following the unanimous approval of the affiliation plan by URW local presidents, the executive council, staff supervisors, and the board of governors, URW notified all members of the proposed affiliation, and on June 24 issued press releases regarding the August mail ballot referendum. On June 25, URW notified all stewards that a special affiliation conference for stewards would be held on July 27. On July 10, URW mailed all members a notice of special membership meetings and information about the referendum. Included in this notice was a copy of the merger agreement and its appendices. URW also posted notices concerning the meetings and referendum. All meetings were conducted as scheduled and members were given an opportunity to discuss the affiliation with URW and UFCW representatives. Instructions, ballots, and preprinted return envelopes were mailed to all URW members on July 31 by an independent direct mail company. During the balloting period, URW operated an affiliation "hot-line" to answer members' questions. The referendum closed on August 20, and on August 21, LaSalle Bank, the URW-appointed trustee of all mailed-in ballots, tabulated the ballots and issued its tally.

The foregoing events make it clear that URW members, including the Respondent's employees, were given sufficient notice of the election, an opportunity to discuss and make an informed decision regarding affiliation, and an opportunity to vote. It is equally clear that the integrity and secrecy of the ballots were maintained. Accordingly, we find that due process was observed in the conduct of the referendum.

Finally, there is no merit to the Respondent's contention that it has no duty to bargain with the Union because, as a result of the commingling of ballots in the affiliation vote, the precise vote in the Respondent's two bargaining units cannot be known. As it is clear, for the reasons discussed below, that the affiliation did not result in a lack of continuity in the representative, and as due-process safeguards on the affiliation election were clearly met, it is unnecessary to determine precisely how each unit of employees of each employer voted.[17] Where there is continuity of representative, an employer has no more right to seize the occasion for questioning majority sentiment in the unit than it would have in the bargaining representative had simply changed its own constitution. See *Financial Institution Employees*, 475 U.S. at 202. continuity of representative was maintained in this case notwithstanding the affiliation with the UFCW.

B. *Continuity of Representative*

As we recently noted in *Western Commercial Transport*, 288 NLRB No. 27 (Mar. 23, 1988), the Supreme Court's decisions in *NLRB v. Financial Institution Employees Local*

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[17] See *House of the Good Samaritan*, 248 NLRB 539 (1980) (no separate vote by employer's employees required where affiliation did not disturb continuity of representative); *American Enka Co.*, 231 NLRB 1335, 1337 (1977) (same). The same principle is implicit in the holding of *American National Insurance Co.*, 281 NLRB No. 105 (Sept. 25, 1986), in which the Board found the employer obligated to bargain with the union following a merger, notwithstanding that ballots in the nationwide balloting were commingled. 281 NLRB slip op. ALJD at 2 and fn. 1.

1182, supra, indicates that, at least with respect to the continuity factor, the general test for determining whether the affiliation of a bargaining representative with another labor organization raises a question concerning representation is whether the affiliation produces a change that is " *'sufficiently dramatic* to alter the union's identity. . . . ' " *Western Commercial Transport*, supra, slip op. at 13, quoting *Financial Institution Employees Local 1182*, supra, 475 U.S. at 206 (emphasis added). In *Western Commercial Transport*, the original union local lost virtually all its autonomy by being totally submerged in a district lodge local of the International labor organization with which it was affiliating. No role was open to the original union's officers except for the possibility that one of them could serve as a chief steward for the bargaining unit or as a unit representative to help create a local negotiating committee; but all day-to-day contact administration was to be taken over by a district lodge staff member.

In the present case no such dramatic alteration of identity has been shown. Rather, the record establishes some organizational changes with respect to relations between the four URW locals and a slight diminution in autonomy in relation to the UFCW International. Although URW's four locals representing the Respondent's employees were merged to form one UFCW Local – Local 881 – this new local has four administrative districts corresponding to the old locals and their governance has remained substantially the same.

Thus, despite the reconstitution, the local officers who were elected by the membership to URW's board of governors prior to affiliation, now serve on Local 881's

general executive board. Likewise, the former URW executive council, composed of Burki and Koukl, and the former URW professional staff, now serve as Local 881's executive council and are also part of the general executive board. Clearly, only the names of the governing bodies and the organizational subgroupings have been altered; the leaders and the essential structures remain the same.

The authority of the pre- and post-affiliation leadership also remains constant, as evidenced by the fact that URW local officers had no authority other than that exercised in their capacity as members of the board of governors. Significantly, the authority of Local 881's leaders to negotiate collective-bargaining agreements and fashion bargaining proposals and discipline members, and the authority of members to ratify collective-bargaining agreements and call strikes, are virtually identical to their preaffiliation authority. Further, Local 881 has retained all URW property and assets, including the URW treasury. Additionally, although UFCW locals set initiation fees and dues by majority membership vote subject to minimums set forth in the UFCW constitution and although the International charges a monthly per capita tax, there is no evidence of an affiliation-related dues increase. The merger agreement explicitly states that no tax will be imposed on Local 881 members for a period of 3 years.[18]

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[18] According to the UFCW's International constitution, arts. 14-16, during this intervening 3 year period (specifically on or before August 1983) a convention of the International was scheduled to be held at which Local 881 would have the right to present resolutions to change the per capita tax requirement or any other provision in the International constitution.

Also, we note that former URW members in good-standing become members of UFCW and were eligible to run for UFCW office upon affiliation. Finally, we note that Local 881 stood ready to assume the collective-bargaining agreements between URW and the Respondent at the time of the affiliation and attempted to do so.

In view of the retention of local officers and assets and the corresponding evidence showing that there has been no substantial impairment or reduction of local autonomy, we find that continuity of representative has been preserved. Further, this finding of Local 881's separate autonomy is not negated by the right of the International under its constitution to approve certain actions taken by the local, including approval of initial negotiated proposals drafted by the local, and collective-bargaining agreements negotiated by the local prior to submission to local union membership for ratification. These reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs. Indeed, if such conditions were sufficient to warrant a finding that an affiliation had produced changes in the local that raised a question concerning representation, this would be tantamount to a conclusion that virtually any affiliation of a local with an International would raise such a question. We see no basis in either precedent or policy for such a rule.

Given that due-process safeguards in the affiliation referendum were observed and there exists a continuity of representative, we find that the affiliation of URW with UFCW was proper and raises no question concerning representation.

The Unfair Labor Practices

The Respondent admits in its answer to the complaint, and also acknowledges by the way of the parties' joint stipulation, that it has refused to recognize and bargain with Local 881. Having found that the affiliation raises no question concerning representation, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 881 as the exclusive bargaining representative of its employees in the units described above. The Respondent further admits and has stipulated, and we find, that since November 1 it has: (1) refused to process grievances filed by Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements in accordance with those agreements; (3) refused to transmit initiation fees and dues to Local 881, as required by the collective-bargaining agreements; (4) refused to adhere to the union-shop provisions of the collective-bargaining agreements; and (5) refused to submit the names and addresses of newly hired employees in accordance with the collective-bargaining agreements. We find that by engaging in the enumerated conduct, the Respondent has unilaterally modified its collective bargaining agreements with Local 881 and has violated Section 8(a)(5) and (1) of the Act.

Conclusion of Law

1. United Retail Workers Union, Local No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC is the exclusive bargaining representative of all the Respondent's employees in the following units:

(a) employees employed in the Venture operations at the following locations: 1) 9449 Skokie Boulevard, Skokie, Illinois; 2) 116 South Waukegan, Deerfield, Illinois; 3) 444 East Rand Road, Arlington Heights, Illinois; 4) 421 East North Avenue, Glendale Heights, Illinois; 5) 125 West 87th Street, Chicago, Illinois; 6) 11440 South Halsted Street, Chicago, Illinois; 7) 7601 South Cicero Avenue, Chicago, Illinois; 8) 6063 Broadway, Merrillville, Indiana; 9) 1311 Golf Road, Schaumburg, Illinois; and 10) 1740 North Kostner, Chicago, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said stores, but who are not part of the facility's normal employee complement.

(b) All employees employed in Venture operations located at 2800 North Water Street, Decatur, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said store, but who are not part of the facility's normal employee complement.

2. By refusing on and after November 1, 1981, to recognize and bargain with Local 881 as the exclusive bargaining representative of the employees in the units described above, the Respondent had violated Section 8(a)(5) and (1).

3. By refusing to process grievances filed by Local 881, to grant Local 881 representatives access to its stores for purposes of administering its collective-bargaining agreements, to transmit initiation fees and dues to Local 881, to enforce the union-shop provisions of the collective-bargaining agreements, and to submit the names and addresses of newly hired employees – all in accordance with the applicable collective-bargaining agreements – the Respondent violated Section 8(a)(5) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. With respect to dues and fees collected by the Respondent pursuant to check-off, but withheld from Local 881, we shall order that all such funds be remitted to Local 881, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[19]

ORDER

The National Labor Relations Board orders that the Respondent, May Department Stores Company, Venture

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[19] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Stores Division, Chicago and Decatur, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local 881 as the exclusive bargaining representative of the employees in the two units described in this decision.

(b) Refusing to process grievances filed by Local 881, pursuant to the applicable collective-bargaining agreements.

(c) Refusing to grant Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements.

(d) Refusing to transmit initiation fees and dues to Local 881, pursuant to the collective-bargaining agreements.

(e) Refusing to enforce the union-shop provisions of the collective-bargaining agrements. [sic]

(f) Refusing to submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Local 881 as the exclusive representative of all employees in the units described in this decision with respect to rates of

pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Process all grievances filed on or after November 1, 1981, by Local 881, pursuant to the applicable collective-bargaining agreements.

(c) Allow Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements.

(d) Transmit to Local 881 all fees and dues collected on or after November 1, 1981, with interest, as set forth in the remedy section of this decision.

(e) Adhere to the union-shop provisions of the collective-bargaining agreements.

(f) Submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

(g) Post at its 10 Chicago, Illinois area stores and its Decatur, Illinois store copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNTIED [sic] STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 1988

James M. Stephens, Chairman

Marshall B. Babson, Member

Mary Miller Cracraft, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with United Retail Workers Union, Local 881, chartered by

United Food and Commercial Workers International Union, AFL-CIO, CLC as the exclusive bargaining representative of our employees in the following units:

(a) employees employed in the Venture operations at the following locations: 1) 9449 Skokie Boulevard, Skokie, Illinois; 2) 116 South Waukegan, Deerfield, Illinois; 3) 444 East Rand Road, Arlington Heights, Illinois; 4) 421 East North Avenue, Glendale Heights, Illinois; 5) 125 West 87th Street, Chicago, Illinois; 6) 11440 South Halsted Street, Chicago, Illinois; 7) 7601 South Cicero Avenue, Chicago, Illinois; 8) 6063 Broadway, Merrillville, Indiana; 9) 1311 Golf Road, Schaumburg, Illinois; and 10) 1740 North Kostner, Chicago, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said stores, but who are not part of the facility's normal employee complement.

(b) All employees employed in Venture operations located at 2800 North Water Street, Decatur, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said store, but who are not part of the facility's normal employee complement.

WE WILL NOT refuse to process grievances filed by Local 881, pursuant to the collective-bargaining agreements in effect with Local 881.

WE WILL NOT refuse to grant Local 881 representatives access to our stores for purposes of administering the collective-bargaining agreements.

WE WILL NOT refuse to transmit initiation fees and dues to Local 881, pursuant to the ckeckoff provisions of the collective-bargaining agreements.

WE WILL NOT refuse to adhere to the union-shop provisions of the collective-bargaining agreements.

WE WILL NOT refuse to submit the names and addresses of newly hired employees to the Local 881, as required by the collective-bargaining agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Local 881 as the exclusive representative of all employees in the units described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL process all grievances filed on or after November 1, 1981, by Local 881, pursuant to the applicable collective-bargaining agreements.

WE WILL allow Local 881 representatives access to its stores for purpose of administering the collective-bargaining agreements.

WE WILL transmit to Local 881 all fees and dues collected pursuant to checkoff on or after November 1, 1981, with interest.

WE WILL adhere to the union-shop provisions of the collective-bargaining agreements.

WE WILL submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 219 S. Dearborn Street, Chicago, Illinois 60604-1702, Telephone 312-353-7597.

APPENDIX D

NOT INCLUDED IN
BOUND VOLUMES
OCTOBER 25, 1988

SJC
Chicago and Decatur, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION

and

UNITED RETAIL WORKERS UNION
LOCAL NO. 881, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Cases 13-CA-21660
13-CA-21696

DECISION AND ORDER DENYING MOTION

On June 30, 1988,[1] the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[2] finding that the affiliation of the United Retail Workers Union (URW) with the United Food and Commercial Workers International Union (UFCW) was

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[1] All dates are in 1988 unless otherwise stated.

[2] 289 NLRB No. 88.

proper and that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with Local 881, as the URW became known following the affiliation.

Thereafter, on July 28, the Respondent filed its Motion for Reconsideration and to Reopen the Record, contending that: (1) the Board decision "ignores the fact that URW members were not allowed to select their bargaining representative on a bargaining unit by bargaining unit basis," and therefore, due process was not observed in the affiliation election; (2) the Board improperly applied the standard for assessing continuity of representation as set forth in *Western Commercial Transport*, 288 NLRB No. 27 (November 6, 1987), by focusing on autonomy at the local level and failing to consider Local 881's input, or loss thereof, at the international level; and (3) the record should be reopened to receive newly available evidence indicating that the number of its employees represented by the URW has drastically declined since the affiliation election on August 20, 1981. On August 12, the General Counsel filed an opposition to the motion.

The Board, having duly considered the matter, denies the Motion for Reconsideration and to Reopen the Record as lacking merit. As to the issues numbered (1) and (2) above, the Respondent raises no issue not previously considered by the Board.[3] As to issue (3), *Impact*

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[3] Member Johansen did not participate in the decision. However, he agrees with his colleagues that the issue that the Respondent raises in (1), above, lacks merit. See, e.g., *House of the Good Samaritan*, 248 NLRB 539 (1980). Similarly, while he dissented from the majority in *Western Commercial Transport*,

(Continued on following page)

Industries, Inc., v. NLRB, 847 F.2d 379 (7th Cir. 1988), on which the Respondent relies, is inapposite as it involves the propriety of a *Gissel* bargaining order.[4] In *Impact Industries*, which involved an initial organizing campaign, in the court's view, the passage of time, high turnover and new management rendered it likely that a new representation election could be conducted in an atmosphere free of the effects of unfair labor practices committed by the employer. Conversely the instant case concerns the Respondent's obligation to bargain with the incumbent representative of its employees from which it withdrew recognition and with which it refused to bargain. Further, the Respondent does not contend that Local 881 no longer enjoys majority support. Even assuming, however, that the Respondent is making a claim of loss of union majority status when it asserts that a "drastic decline" in represented employees occurred during the seven-year period in which the instant case has been litigated, we could not, consistent with policies of the Act, allow the Respondent to rely on such changes to cast doubt on incumbent Local 881's continuing majority status and thereby succeed in perpetuating its unlawful withdrawal of recognition. See generally, *NLRB v. Creative Food Design*, ___ F.2d ___, 128 LRRM 3089, 3094 (D.C. Cir. July 26, 1988).

(Continued from previous page)

supra, Member Johansen agrees with the analysis in the decision finding *Western Commercial Transport* factually distinguishable. 289 NLRB No. 88, slip op. at 14-15.

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

ORDER

IT IS ORDERED that the Respondent's Motion is denied as it lacks merit and raises no substantive matters not previously considered by the Board.

Dated, Washington, D.C. October 25, 1988.

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

1. Full Text of 29 U.S.C. § 158(a)(1):

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

2. Full text of 29 U.S.C. § 158(a)(5):

(a) It shall be an unfair labor practice for an employer –

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

3. Full text of 29 U.S.C. § 159(a):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement

then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.